Filed 5/22/19 P. v. Smith CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DION ANDRE SMITH, Defendant and Appellant.	B277974 (Los Angeles County Super. Ct. No. TA140087)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael J. Schultz, Judge. Reversed and remanded for new trial.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Dion Andre Smith appeals from a judgment of conviction entered after the jury found him guilty of two armed robberies and two counts of possession of a firearm by a felon. He contends the trial court erred in denying his *Batson/Wheeler*[1] motions challenging the prosecutor's exercise of peremptory challenges to four Black jurors. We conclude Smith made a prima facie case as to the first excused Black prospective juror, and the prosecutor did not offer a credible race-neutral justification for the strike. We reverse the judgment and remand for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Amended Information*

The amended information charged Smith with five felony counts arising from three separate robberies, including the second degree robberies of Alfonso Contreras (count 1) and Samuel Hernandez (count 2) (Pen. Code,[2] §§ 211, 212.5, subd. (c)); the first degree robbery of Oscar Ayala (§§ 211, 212.5, subd. (a); count 4); and two counts of possession of a firearm by a felon (§ 29800, subd. (a)(1); counts 3 & 5). The amended information specially alleged firearm enhancements as to counts 2 and 4, and that Smith committed the offenses charged in counts 4 and 5 while out of custody on bail (§ 12022.1). The amended information also alleged Smith suffered a prior felony conviction that constituted a strike within the meaning of the three strikes law (§§ 667, subds. (b)-(j), 1170.12) and a serious felony within

---

1 *Batson v. Kentucky* (1986) 476 U.S. 79, 89 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 (*Wheeler*).

2 Undesignated statutory references are to the Penal Code.

the meaning of section 667, subdivision (a)(1), and Smith served two prior prison terms within the meaning of section 667.5, subdivision (b).

Smith pleaded not guilty and denied the special allegations.

B. *The Evidence at Trial*

On February 8, 2016 Contreras, an employee of a hardware store in Lynwood, was outside the store cleaning a water heater. Someone hit him in the head and ribs from behind and yanked the chain from his neck, leaving a mark. Contreras stumbled onto the water heater and fell. When he got up, he saw the back of the retreating hooded robber. Video surveillance footage from a nearby tire store showed the robber was a Black man, wearing a red shirt, black shorts, and a black hooded sweatshirt. The robber got into the passenger side of a waiting black Lexus, driven by another Black man, and the car left the area.

On February 22, 2016 Hernandez, a mechanic at an automobile glass store, was outside the store helping a customer. A Black man wearing beige shorts, a T-shirt, and a gray cap approached Hernandez and the customer, and pointed a gun at Hernandez. The robber took Hernandez's gold chains, cell phone, and wallet, which contained his identification card and $300 in cash. The robber entered the passenger side of a black Lexus, and the car drove away. Sheriff's deputies detained Smith, who was driving a black Lexus. Hernandez later identified the gold chain that was found in Smith's pants pocket, but stated Smith was not the robber. Deputies searched Smith's vehicle and found a gray cap and a hidden .40-caliber semiautomatic handgun with an attached magazine that had several bullets in it.

On February 26, 2016 Ayala was on the sidewalk outside a tire store when Smith and another Black man stopped in front of him. Ayala was wearing two gold chains, with the larger one hanging outside his shirt. One of the men tried to pull both chains from Ayala's neck, but could only grab the smaller one. Ayala punched one of the men; the other man hit Ayala; then the men ran away. Ayala's large gold chain broke, and he put it into his pocket. As Ayala was calling 911, a car pulled up, and Smith and the other robber got out of the car. Ayala ran towards an apartment unit behind the tire store. Smith pointed a gun at Ayala's face and entered the apartment. Ayala pushed the gun away, and the gun fired. Smith pointed the gun at Ayala's head and told him, "Give me the chain . . . or I'm gonna smoke you." After Ayala handed over his gold chain, Smith ran out of the apartment.

C. *The Verdict and Sentence*

The jury found Smith not guilty of the robbery of Contreras (count 1). They found Smith guilty of the robberies of Hernandez (count 2) and Ayala (count 4), and of possession of a firearm by a felon (counts 3 and 5). In addition, the jury found true as to count 1 a principal was armed with a firearm in the commission of the offense and as to count 4 that Smith personally used a firearm. Smith later admitted the prior conviction allegations. The trial court found true that Smith committed the offenses in counts 4 and 5 while out of custody on bail. The trial court sentenced Smith to an aggregate state prison sentence of 29 years four months.

DISCUSSION

A. *The Challenged Jurors*

The prosecutor exercised peremptory challenges to excuse four prospective Black jurors: Henry C., T.N., L.E., and Rodney C. Smith contends all four challenges were made for a discriminatory purpose, and the trial court erred in denying his three *Batson/Wheeler* motions.[3]

1. *Prospective juror Henry C.*

Henry C. was single and lived in Compton. He worked as a ramp agent for Delta Airlines. Henry C. said he had never been a victim of a crime and had no prior jury experience. When the trial court later asked the first 20 prospective jurors whether they had ever been a victim or witness to a crime, Henry C. did not raise his hand.[4]

To explain circumstantial evidence, the prosecutor questioned Henry C. about a hypothetical involving his three-year-old cousin. The prosecutor said, "Okay. Let's say that you're watching your cousin and you're making him dinner, and

---

[3] Because we conclude the trial court erred in finding Smith had not made a prima facie showing as to Henry C., we focus on Henry C.'s responses to the voir dire questions. We will also briefly discuss the other jurors for background.

[4] The trial court commenced voir dire with the first 20 prospective jurors. As each prospective juror was excused from the jury box, the next juror in the first group of 20 took that seat and seat number. Once there were fewer than 12 jurors in the jury box, questioning continued as to the remaining jurors in the courtroom.

there are also some cookies on the counter. You say, 'Do not eat the cookies before you eat dinner. It's not good for you. You'll fill up on sugar.' He says, 'Yes. Okay. I understand.' [¶] And you turn around and you walk out of the room, and you hear a crash. You go back to the kitchen. The cookie jar is broken on the floor, and your little cousin has cookie crumbs all over his face, and he's munching like that. [¶] Did he eat the cookie?" Henry C. responded, "Yeah." The prosecutor asked, "What if he said, 'No, I didn't eat the cookie'? Did he eat it?" Henry C. answered, "Yeah."

The prosecutor asked Henry C. no further questions. She exercised her third peremptory challenge to excuse him from the jury panel. At this point Smith's counsel made his first *Batson/Wheeler* motion, arguing there was no reason to exclude Henry C. from the jury. Smith's counsel stated, "He said nothing negative to the prosecution. He answered the People's hypothetical about the cookie the way the People wanted, despite the fact I'm not sure that was even a good statement of law. He seems, in all senses, a good prosecution juror, other than the fact—for the record, he is African-American." The trial court asked the prosecutor if she wanted to be heard on whether Smith had made a prima facie case. The prosecutor replied, "No, not in terms of that."

The trial court denied the motion, finding Smith had not made a prima facie showing. The court explained, "I'll note for the record, if I'm not mistaken, there are two African-American jurors left on the panel and that this was a peremptory challenge exercised against one African-American male. [¶] [T]here are

others as well in the pool yet to be called. So the court finds there's no prima facie showing of systematic exclusion."[5]

2. *Prospective juror T.N.*

T.N. was single and lived in Carson. She had no previous jury experience. She was a full-time nursing student working as an unpaid intern at a medical center. T.N. reported witnessing an assault on her brother. She stated, "Last year, my brother was assaulted, and we caught the man, but . . . when my brother got a copy of the report, the police falsified everything that my brother was saying. He was saying my brother was the aggressor and he was the one that was attacking the person who punched him." Her brother was not arrested or charged with assault. T.N. did not think that experience would make her an unfair juror to either side.

When the prosecutor asked the prospective jurors whether they had a problem with someone not reporting a crime, T.N. responded: "I think people should say something about it. If the community is complaining about crime and they're not saying anything, I feel like [they're] part of the problem." The prosecutor exercised her fifth peremptory challenge to excuse T.N.

---

[5] Henry C. was the first prospective Black juror excused from the jury panel. At the time of the peremptory challenge, there were two other Black jurors among the first 20 prospective jurors who were being questioned: T.N. and Juror No. 1748, who was later sworn in as Juror No. 6. Juror No. 1748 was retired from the United States Postal Service and lived in Compton. He was married and had three adult children. He served on a jury that reached a verdict in a criminal case 15 years earlier. He had been a victim of robbery and burglary.

3. *Prospective juror L.E.*

L.E. lived in Long Beach, and was a single parent of three children. He worked as a United States Postal Service clerk and had never served as a juror.

L.E. was a victim of a shooting in 2004. He called the police, but no one was caught. He did not think the police did a good job of investigating the crime, explaining, "Well, they tried to convince me . . . that I provoked the shooting, you know, and it was at my house . . . in Moreno Valley at the time. I just told them to leave my house." He added that the police "tried to put everything on me as if it was my fault, and I just said, 'I don't need your help anymore.'" L.E. stated he did not file a complaint against the police, but instead "just let it go." When asked if there was anything about the experience that would make him unfair to either side, L.E. responded, "No, not at all." He also was a witness to a crime "a while ago."

L.E. had a brother and cousins who had been convicted of crimes. They were not currently incarcerated, but his cousin "went for murder in 1984, and he recently got out, but I haven't seen him, spoke to him since." When asked whether his relatives' experiences would make him unfair to either side, L.E. responded, "No, not at all."

The prosecutor initially accepted the panel with L.E. on it. However, after defense counsel excused another prospective juror, the prosecutor exercised her sixth peremptory challenge to excuse L.E. At that time, Smith's counsel made his second *Batson/Wheeler* motion. The trial court stated, "[T]he People have utilized six peremptory challenges. Three of those peremptory challenges have been utilized against African-

Americans. One of them has been utilized against an African-American female. The panel consists of 11 prospective jurors, two of which are African-American males.[6] There [are] no other African-American females." The court added, "With respect to the final peremptory challenge utilized by [the prosecutor], the court will note [L.E.] was a juror who was a victim of a pretty serious crime, was pretty upset with how the police behaved in terms of investigating crime, indicated that they didn't do a good job of trying, . . . that they treated him as if he were a suspect, even though he was a victim. [¶] He also has cousins and a brother who was convicted of some serious crimes. None of that went to cause. That is, it certainly did not rise to the level of cause, but I can understand why the People would exercise their peremptory challenge against him. [¶] The court finds that there's not [a] prima facie case that's made."

4. *Prospective juror Rodney C.*

Rodney C. lived in Downey and was married with two adult children. He taught video production as a part-time high school

---

[6] The two Black male jurors were Juror No. 1748 and Juror No. 9510. As noted, Juror No. 1748 was in the first panel of 20 prospective jurors; Juror No. 9510 was added in the next group of prospective jurors. Juror No. 9510 lived in the Athens area of Los Angeles and worked as an energy technician. He was married and had five daughters. He served on a jury that reached a verdict in a criminal case three years earlier. He had cousins who were Los Angeles County sheriff's deputies. Juror No. 9510 stated he was a victim of a home burglary, but no one was home at the time. Juror No. 1748 and Juror No. 9510 were the only two Black jurors who served on the jury panel that tried Smith.

teacher; his wife was a teacher. He had served on three or four juries that reached verdicts in criminal cases.

Rodney C. said his best friend and the friend's wife had an argument, and the friend accidentally shot his sister-in-law. The friend was arrested and charged with assault with a deadly weapon. Rodney C. testified as a witness at the trial. Rodney said as to the trial, "I thought the district attorney in that particular case was unfairly obfuscating what happened and attempting to confuse me by asking me about things out of time sequence and trying to confuse me. I felt it was a deliberate tactic to confuse me." Rodney C. indicated he would not hold these feelings against the prosecutor and did not think the experience would make him unfair to either side.

When the court asked if anyone had an experience with law enforcement that was profoundly negative or positive, Rodney C. raised his hand, and described an incident in the 1970's in which he was repairing his vehicle at a gas station with several young Black men. The gas station owner called the police, and the police officers "were obviously intending to harass us to get us to leave this gas station when we were just simply trying to fix our car in a rainstorm so that we could leave." However, Rodney C. added that he had "no opinions about law enforcement officers," and had enrolled in the police academy, but could not complete it because of "health reasons." Rodney C. said the experience would not make him unfair to either side.

The prosecutor used her seventh peremptory challenge to excuse Rodney C. Smith's counsel then made his third *Batson/Wheeler* motion.

5. *Smith's third* Batson/Wheeler *motion*

Smith's counsel noted the prosecutor had used four of her seven peremptory challenges against Black prospective jurors. Smith's counsel argued, "Three of those seven have been used against African-American males. Although, clearly, some things said about [Rodney C.] about past connections to crime, it doesn't appear in any way that he's going to be unfair. He's a very establishment guy, a retired teacher. The wife is a teacher. And on three previous verdicts, jurors all reached a verdict. I don't see any legitimate reason for kicking him."

The trial court found Smith made a prima facie showing of group bias as to Rodney C., and asked the prosecutor to provide her reasons for excusing him. The prosecutor pointed to Rodney's negative experience as a witness being questioned by another prosecutor, the police officers' harassment of him in the 1970's, and that as a teacher he might have sympathy for young men, including defendant.

The court found the prosecutor had rebutted Smith's prima facie case, explaining that Rodney C. provided "a narrative about having a profoundly negative experience with the police, about when his car broke down in the gas station, he was trying to fix it, and he thought that the police were, quote, harassing him. And yeah, it happened many, many years ago, both of these incidents. However, the People don't need a reason to excuse him. The court only needs to find that the reason they excused him was . . . permissible and she was not exercising group bias. And I find that . . . she has rebutted the prima facie case."

Smith's counsel argued the prosecutor should be required to give her reasons for excusing the prior Black male jurors because it had found a prima facie case as to Rodney C. The

court rejected this argument, explaining that "the Supreme Court holds to the contrary, that once a trial court finds a prima facie bias as to one prospective juror, . . . it is not required to ask for race neutral explanations for the others. [¶] With that said, [the prosecutor is] welcome to explain . . . the reasons for excluding the other African-American jurors."

The prosecutor stated as to T.N., "She was a female who discussed how she witnessed an assault on her brother. When law enforcement came, they falsified the report, in her opinion, and shifted the blame from who[m] she perceived to be the assailant and the aggressor to her brother. That is why I used a peremptory challenge on her."

As to Henry C., the prosecutor stated, "He was a younger male, single, from Compton. I marked him as being in his 20's. He could have been in his 20's or 30's. [¶] The court asks the question whether someone's been a victim or witness to any crime multiple times. I was looking out to see what his responses would be to that. He didn't respond either time. [¶] When I thought—I thought would have been a different way when I brought up the concept of reporting on crimes and how it's perceived in the community, there was another juror that I ended up speaking with about that. He was unresponsive to that. [¶] I frankly felt like he probably had information just or feelings about that that he wasn't disclosing, which is why I brought up the topic and was particularly looking to see what sort of feedback I would get from him on that in either direction, pro or anti prosecution and law enforcement. [¶] Because I didn't get anything from him, I didn't want to single him out further, but I decided to use a peremptory challenge on him."

Finally, the prosecutor stated as to L.E., "He had relatives who were both victims and convicts. He, himself, was upset that the police didn't do a good job of investigating an incident, and I think he also felt that the blame had been shifted from the assailant to him in a situation. [¶] . . . [¶] Also, he was—his demeanor was a little bit erratic, in my opinion. He was kind of talkative, but all over the place. I didn't get a good feeling about his ability to be cooperative and focused."

B. Batson/Wheeler *Analysis*

Smith, who is Black, contends the prosecutor's peremptory challenges to excuse four Black prospective jurors deprived him of his federal constitutional right to equal protection (*Batson, supra*, 476 U.S. at p. 88) and state constitutional right to a trial by a jury drawn from a representative cross-section of the community (*Wheeler, supra*, 22 Cal.3d at pp. 276-277). As a result of the prosecutor's challenges, the jury panel that tried Smith's case included only two Black jurors. We conclude the trial court erred in failing to find Smith made a prima facie showing of an inference of discriminatory purpose.

"'[A] party may exercise a peremptory challenge for any permissible reason or no reason at all' [citation] but 'exercising peremptory challenges solely on the basis of race offends the Fourteenth Amendment's guaranty of the equal protection of the laws' [citations]. Such conduct also 'violates the right to trial by a jury drawn from a representative cross-section of the community under article 1, section 16, of the California Constitution.'" (*People v. Smith* (2018) 4 Cal.5th 1134, 1146 (*Smith*); accord, *People v. Winbush* (2017) 2 Cal.5th 402, 433 (*Winbush*) ["Both state and federal Constitutions prohibit the use of peremptory

challenges to remove prospective jurors based on their race or membership in a cognizable group."].) "'The "Constitution forbids striking even a single prospective juror for a discriminatory purpose."'" (*People v. Hardy* (2018) 5 Cal.5th 56, 76 (*Hardy*); accord, *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158 (*Gutierrez*) ["Exclusion of even one prospective juror for reasons impermissible under *Batson* and *Wheeler* constitutes structural error, requiring reversal."].)

A three-step procedure governs the analysis of *Batson/Wheeler* motions. (*People v. Armstrong* (2019) 6 Cal.5th 735, 766 (*Armstrong*); *Smith, supra*, 4 Cal.5th at p. 1147.) "'First, the defendant must make a prima facie showing that the prosecution exercised a challenge based on impermissible criteria. Second, if the trial court finds a prima facie case, then the prosecution must offer nondiscriminatory reasons for the challenge. Third, the trial court must determine whether the prosecution's offered justification is credible and whether, in light of all relevant circumstances, the defendant has shown purposeful race discrimination. [Citation.] "The ultimate burden of persuasion regarding [discriminatory] motivation rests with, and never shifts from, the [defendant]."'" (*Smith*, at p. 1147; accord, *Armstrong*, at p. 766 ["The defendant's ultimate burden is to demonstrate that 'it was more likely than not that the challenge was improperly motivated.'"].)

To make a prima facie case, a defendant must show "'"that the totality of the relevant facts gives rise to an inference of discriminatory purpose."'" (*Armstrong, supra*, 6 Cal.5th at p. 766; accord, *People v. Scott* (2015) 61 Cal.4th 363, 384 (*Scott*) ["existence of a prima facie case depends on consideration of the entire record of voir dire as of the time the motion was made"].)

"Although we examine the entire record when conducting our review, certain types of evidence are especially relevant. These include whether a party has struck most or all of the members of the venire from an identified group, whether a party has used a disproportionate number of strikes against members of that group, whether the party has engaged those prospective jurors in only desultory voir dire, whether the defendant is a member of that group, and whether the victim is a member of the group to which a majority of remaining jurors belong." (*People v. Reed* (2018) 4 Cal.5th 989, 999-1000 (*Reed*); accord, *People v. Sánchez* (2016) 63 Cal.4th 411, 434 (*Sánchez*); *Scott*, at p. 384.)

"The showing required to establish an inference of discrimination at *Batson*'s first step is a 'low threshold.'" (*Reed, supra*, 4 Cal.5th at p. 1020; accord, *Scott, supra*, 61 Cal.4th at p. 384.) As the United States Supreme Court explained in *Johnson v. California* (2005) 545 U.S. 162, 170, "We did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred."

In the second stage, "the prosecutor 'must provide a "'clear and reasonably specific' explanation of his [or her] 'legitimate reasons' for exercising the challenges." [Citation.] "The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." [Citation.] A prospective juror may be excused based upon facial expressions,

gestures, hunches, and even for arbitrary or idiosyncratic reasons.'" (*Winbush, supra*, 2 Cal.5th at p. 434; accord, *Hardy, supra*, 5 Cal.5th at p. 76.)

In the third stage, "'[c]redibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.'" (*Armstrong, supra*, 6 Cal.5th at p. 767; accord, *Smith, supra*, 4 Cal.5th at p. 1147.) "'The inquiry is focused on whether the proffered neutral reasons are subjectively *genuine*, not on how objectively reasonable they are.'" (*Hardy, supra*, 5 Cal.5th at p. 76; accord, *Gutierrez, supra*, 2 Cal.5th at p. 1158 ["This . . . inquiry focuses on the subjective genuineness of the reason, not the objective reasonableness."].) "'[I]n reviewing a trial court's reasoned determination that a prosecutor's reasons for striking a juror are sincere, we typically defer to the trial court and consider only "whether substantial evidence supports the trial court's conclusions."'" (*Smith*, at p. 1147; accord, *Armstrong*, at p. 768.)

If a trial court concludes a defendant has made a prima facie showing in a later *Batson/Wheeler* motion, it is not obligated to revisit its rulings on earlier *Batson/Wheeler* motions. (*Armstrong, supra*, 6 Cal.5th at p. 767 ["Trial courts are no longer obligated to revisit their rulings on earlier *Wheeler/Batson* motions when they conclude the defendant has made out a prima facie case in connection with a later motion."]; *People v. Avila* (2006) 38 Cal.4th 491, 549 (*Avila*) ["[W]hen a trial court determines that the defendant has made a prima facie showing that a particular prospective juror has been challenged because of such bias, it need not ask the prosecutor to justify his or her challenges to other prospective jurors of the same group for which

the *Batson/Wheeler* motion has been denied."].) However, a trial court has "the power to do so in cases when a subsequent challenge places an earlier challenge in a new light." (*Armstrong*, at p. 767; *Avila*, at p. 552 [upon defendant's request, trial court may revisit earlier *Batson/Wheeler* challenges "when the prosecutor's subsequent challenge to a juror of a protected class casts the prosecutor's earlier challenges of the jurors of that same protected class in a new light, such that it gives rise to a prima facie showing of group bias as to those earlier jurors"].)

The Supreme Court in *Scott* addressed the circumstances under which a reviewing court should consider the prosecutor's justifications for a challenge to a prospective juror as part of a first-stage *Batson/Wheeler* analysis. The court observed "that an appellate court properly reviews the first-stage ruling if the trial court has determined that no prima facie case of discrimination exists, then allows or invites the prosecutor to state reasons for excusing the juror, but refrains from ruling on the validity of those reasons." (*Scott, supra*, 61 Cal.4th at p. 386.) Although a reviewing court may not rely on the prosecutor's reasons for excusing a juror to support the trial court's finding there was no prima facie case, "[t]he legal calculus is different when the reason offered by the prosecutor is not used by the reviewing court to defeat a prima facie case of discrimination, but to bolster it." (*Id.* at pp. 390.)

As the *Scott* court explained, "Both *Batson* and *Wheeler* emphasized that the purposeful exclusion of identifiable groups from participation on juries undermines public respect for our criminal justice system. [Citations.] When discriminatory intent is "'inherent'" in the explanation offered by the prosecutor [citation], the public's confidence in the rule of law suffers,

regardless of whether the defendant was able to make out a prima facie case of discrimination. In these circumstances, 'justice must satisfy the appearance of justice.' [Citation.] Reviewing courts, therefore, should not blind themselves to the record in the 'rare' circumstance that a prosecutor volunteers a justification that is discriminatory on its face." (*Scott, supra,* 61 Cal.4th at pp. 390-391; see *Sánchez, supra*, 63 Cal.4th at pp. 435-437 [considering nondiscriminatory reasons for excusing jurors """discernable on the record""" as part of its first-stage analysis of the totality of the circumstances where prosecutor stated reasons for challenges but trial court did not evaluate reasons].)

We independently review the trial court's first-stage finding as to Henry C. to resolve """the *legal* question whether the record supports an inference that the prosecutor excused a juror" on a prohibited discriminatory basis.'" (*People v. Parker* (2017) 2 Cal.5th 1184, 1211 (*Parker*); accord, *Sánchez, supra*, 63 Cal.4th at p. 434; *Scott, supra*, 61 Cal.4th at p. 384; see *Armstrong, supra*, 6 Cal.5th at p. 766 [citing *Sánchez* for standard of review for first-stage ruling].)[7]

---

[7] The courts in *Parker*, *Sánchez*, and *Scott* applied an independent standard of review both because the trial preceded the United States Supreme Court's ruling in *Johnson v. California, supra*, 545 U.S. 162, and because it was not clear from the record whether the trial court analyzed the *Batson/Wheeler* motion under the more stringent standard applicable prior to *Johnson*. (*Parker, supra*, 2 Cal.5th at p. 1211; *Sánchez, supra*, 63 Cal.4th at p. 434; *Scott, supra*, 61 Cal.4th at p. 384.) We apply an independent review standard here because the trial court did not make clear the standard it applied and appeared to apply a

C. *Smith Made a Prima Facie Showing of Group Bias as to Henry C.*

After the prosecutor used her third peremptory challenge to excuse Henry C., the trial court denied Smith's *Batson/Wheeler* motion, finding Smith had not made a "prima facie showing of systematic exclusion" because there were two Black prospective jurors on the panel and other Black jurors in the jury pool. But "the issue is not whether there is a pattern of systematic exclusion; rather, the issue is whether a particular prospective juror has been challenged because of group bias." (*Avila, supra*, 38 Cal.4th at p. 549.) "[A] single discriminatory exclusion may also violate a defendant's right to a representative jury." (*Ibid.*; see *Gutierrez, supra*, 2 Cal.5th at p. 1158 ["At issue in a *Batson/Wheeler* motion is whether any specific prospective juror is challenged on account of bias against an identifiable group distinguished on racial, religious, ethnic, or similar grounds."].)

We review the entire voir dire record as of the time Smith made his *Batson/Wheeler* motion as to Henry C. (*Scott, supra*, 61 Cal.4th at p. 384 ["the question at the first stage concerning the existence of a prima facie case depends on consideration of the entire record of voir dire as of the time the motion was made"]; *People v. Lenix* (2008) 44 Cal.4th 602, 624 ["the trial court's finding is reviewed on the record as it stands at the time the *Wheeler/Batson* ruling is made"].)

Both Smith and Henry C. are Black. At the time the prosecutor excused Henry C., there were two other Black jurors

---

more stringent standard than that applicable under Supreme Court precedent, requiring Smith to make a prima facie showing of systematic exclusion. (See *Avila, supra*, 38 Cal.4th at p. 549.)

among the first 20 prospective jurors: T.N. and Juror No. 1748, who was later sworn in as a juror. Henry C. stated he was single, lived in Compton, worked for Delta Airlines, had never been a victim of a crime, and had no prior jury experience. In response to the prosecutor's questions about a hypothetical with his three-year-old cousin, Henry C. made clear from his response he understood the concept of circumstantial evidence in that he concluded the cousin ate the cookies although Henry C. did not see him do it. The prosecutor did not conduct further direct questioning of Henry C.

Because the trial court later allowed the prosecutor to state her reasons for excusing Henry C., we also consider the prosecutor's stated reasons for excusing him. (*Scott, supra*, 61 Cal.4th at pp. 391-392; see *Sánchez, supra*, 63 Cal.4th at pp. 435-437.) The prosecutor described Henry C. as a "younger male, single, from Compton" who was in his "20's or 30's." She focused on the fact the trial court asked the panel multiple times whether any of them had been a victim or witness to a crime, and Henry C. "didn't respond either time." He also did not respond when she asked the panel their views on people in the community reporting on crimes. She concluded, "I frankly felt like he probably had information just or feelings about that that he wasn't disclosing, which is why I brought up the topic and was particularly looking to see what sort of feedback I would get from him on that in either direction, pro or anti prosecution and law enforcement. [¶] Because I didn't get anything from him, I didn't want to single him out further, but I decided to use a peremptory challenge on him."

The People contend the prosecutor was justified in excusing Henry C. based on her belief that he was not forthcoming about

being a victim or witness to a crime or disclosing his feelings about whether someone should report a crime, citing to *People v. DeHoyos* (2013) 57 Cal.4th 79, 114-115. In *DeHoyos*, the Supreme Court stated, "A genuine concern that a prospective juror is not forthcoming or is not paying sufficient attention to the proceedings is a race-neutral basis for a peremptory challenge . . . ." (*Id.* at p. 114.) *DeHoyos* is distinguishable. In *DeHoyos*, the challenged juror wrote "no" when asked whether she or anyone close to her had been a victim of a crime in the jury questionnaire, but under direct questioning during voir dire, she stated her cousin, with whom she was close, had been murdered. (*Id.* at pp. 113-114.) Further, the challenged juror wrote "no" in response to a question about whether she or a relative had been arrested; however, during voir dire, she stated she forgot her older brother had been arrested several times for minor offenses. (*Id.* at p. 114.)

Here, there is nothing in the record to support the prosecutor's suspicion that Henry C. was a victim or witness to a crime notwithstanding his statement to the contrary. To the extent the prosecutor was relying on the fact Henry C. was a young Black male living in Compton, a city with a significant low-income Black and Hispanic population,[8] this would support

---

[8] On our own motion, we take judicial notice of the 2017 census data for Compton. (Evid. Code, §§ 452, subds. (c) & (h), 459; *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 666, fn. 1 [taking judicial notice of 2000 census data]; *Moehring v. Thomas* (2005) 126 Cal.App.4th 1515, 1523, fn. 4 [taking judicial notice of 2000 decennial census data for Siskiyou County].) According to the 2010 census data, Compton is a city of approximately 96,455 residents, 66.8 percent of whom identify as

Smith's contention the prosecutor excused Henry C. based on a group bias—that a Black male living in a predominantly Black and Hispanic community must be a victim or witness of crime. Moreover, the prosecutor assumed Henry C. was concealing information, yet did not directly question him about his or his family's experience with crime. Neither did she ask Henry C. directly about his views on people in the community reporting crime to the law enforcement. The prosecutor admitted she did not get feedback from Henry C. as to whether he was "pro or anti prosecution and law enforcement." We conclude the totality of the relevant facts gives rise to an inference of discriminatory purpose.

D. *The Prosecutor's Reasons Were Not Sincere*

Because the trial court did not make a *Batson/Wheeler* third-stage ruling as to the credibility of the prosecutor's reasons for excusing Henry C., there are no findings to which we give deference on appeal. (Cf. *Armstrong, supra*, 6 Cal.5th at p. 768 ["Once the trial court engaged in a reasoned examination of [defendant's] showing in light of the record and determined [defendant] had not proven discrimination, its findings became entitled to ""great deference on appeal' and will not be overturned unless clearly erroneous.""].) As part of our third-stage analysis, we consider "'whether the prosecution's offered justification is credible and whether, in light of all relevant circumstances, the

---

Hispanic or Latino, and 30.9 percent of whom identify as Black or African-American with a 23 percent poverty rate. (See United States Census Bureau, Data for 2010 Census <https://www.census.gov/quickfacts/fact/table/comptoncitycalifornia/PST045218> [as of May 22, 2019].)

defendant has shown purposeful race discrimination.'" (*Smith, supra*, 4 Cal.5th at p. 1147; accord, *Gutierrez, supra*, 2 Cal.5th at p. 1159 ["Justifications that are 'implausible or fantastic . . . may (and probably will) be found to be a pretexts for purposeful discrimination.'"].)

The prosecutor did not offer permissible race-neutral justifications for excusing Henry C. The prosecutor thought Henry C. was hiding information because she assumed as a young Black male from Compton, Henry C. must have been a victim or witness to a crime. She also assumed Henry C. would have such strong feelings about crime reporting and his community's perception of crime reporting, that he should have voluntarily offered his opinions about these topics during voir dire. The prosecutor's stated reasons do not justify the peremptory strike of Henry C. (See *Gutierrez, supra*, 2 Cal.5th at p. 1169 [prosecutor's strike of Hispanic prospective juror who lived in Wasco based on her unawareness of gang activity was not race-neutral].)

Moreover, if the prosecutor genuinely believed Henry C. was not forthcoming, she could have asked him additional questions during voir dire. (See *Gutierrez, supra*, 2 Cal.5th at p. 1170 ["[T]he prosecutor's swift termination of individual voir dire of this panelist . . . at least raises a question as to how interested he was in meaningfully examining whether her unawareness of gang activity in Wasco might cause her to be biased against the witness for the People's case."].) Instead, the prosecutor stated she did not "get anything from him" but "didn't want to single him out further."

We conclude Smith has shown that "'it was more likely than not that the challenge was improperly motivated.'"

(*Armstrong, supra*, 6 Cal.5th at p. 766; accord, *Gutierrez, supra*, 2 Cal.5th at p. 1158.) Because exclusion of "even 'a single juror on the basis of race or ethnicity is an error of constitutional magnitude,'" it is unnecessary for us to determine whether the trial court erred in denying the *Batson/Wheeler* motion as to the other Black prospective jurors. (*Gutierrez*, at p. 1172.) We reverse Smith's conviction because he was denied the right to a fair trial in violation of the equal protection of the federal Constitution (*Batson, supra*, 476 U.S. at p. 88), and a right to a trial by a jury drawn from a representative cross-section of the community under the state Constitution (*Wheeler, supra*, 22 Cal.3d at pp. 276-277).[9]

DISPOSITION

We reverse the judgment of conviction and remand for a new trial.

FEUER, J.

WE CONCUR:

ZELON, Acting P. J. SEGAL, J.

---

[9] We therefore do not reach whether we should remand to the trial court to allow it to exercise its discretion to strike the firearm-use enhancements imposed pursuant to sections 12022.5 and 12022.53.